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QUESTIONS PRESENTED

I.

WHETHER THE WHOLESALE PROHIBITION OF CORPORATE INDEPENDENT EXPENDITURES ADVOCATING THE ELECTION OR DEFEAT OF A CANDIDATE FOR POLITICAL OFFICE VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

WHETHER A STATE STATUTE WHICH ABSOLUTELY PROHIBITS ALL NON MEDIA CORPORATIONS, BUT NOT MEDIA CORPORATIONS, LABOR UNIONS, PARTNERSHIPS, OR OTHER UNINCORPORATED ENTITIES, FROM ADVOCATING THE ELECTION OR DEFEAT OF A CANDIDATE FOR POLITICAL OFFICE THROUGH INDEPENDENT EXPENDITURES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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No. 88-1569

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Appellants,

v

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF APPELLEE MICHIGAN STATE CHAMBER OF COMMERCE

STATEMENT OF THE CASE

In Michigan, it is a felony for nonmedia corporations to engage in fundamental First Amendment political speech. Under the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, as amended, Mich. Comp. Laws Ann. §169.201 (West Supp. 1989) *et seq.* ("Act 388"), a corporation "may not make a contribution or expenditure" in support of or in opposition to political candidates. Mich. Comp. Laws Ann. §169.254(1) (West Supp. 1989). The state applies Section 54(1) of Act 388 in a manner not only to prohibit corporate contributions and expenditures, but to also prohibit corporate *independent expenditures* in support of or in opposition to political candidates (hereafter "independent expenditures"). An independent expenditure is defined as:

> [A]n expenditure as defined in Section 6 by a person *if the expenditure is not made at the direction of, or under the control of, another person* and if the expenditure is not a contribution to a committee. [Emphasis added] [Mich. Comp. Laws Ann. §169.209(1) (West Supp. 1989)]

All corporations, except media corporations[1], regardless of their purpose, size, or wealth, are totally prohibited from making independent expenditures. Act 388, however, does not similarly restrict independent expenditures made by individuals, unions, partnerships or other unincorporated organizations.

Appellee, the Michigan State Chamber of Commerce ("State Chamber"), is a Michigan nonprofit membership corporation with approximately 8,000 members representing, among other things, manufacturing, retail, agricultural, finance, construction, and wholesale businesses. [J.A. 121a-123a (Barrett Testimony)]. Approximately 15% of the State Chamber's members have 10 employees or less; 57% have 50 employees or less; 80% have 100 employees or less; and only 20% have more than 100 employees. [J.A. 122a (Barrett Testimony)]. Thus, contrary to the Appellants' mischaracterization, the majority of the State Chamber's members are small businesses and not mega corporations such as General Motors and Ford Motor Company.

The State Chamber is an ideological corporation formed to promote the common good and interests of the Michigan business community. [J.A. 121a (Barrett Testimony)]. It is important for the State Chamber and all businesses, whether incorporated or not, to be involved in electoral politics because elected officials make decisions in the legislative and

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[1] Section 6(3)(d) excludes expenditures made by the media from the definition of expenditure. Mich. Comp. Laws Ann. §169.206(3)(d) (West Supp. 1989).

regulatory process which directly impact the business community. [J.A. 125a (Barrett Testimony)].

In addition, unincorporated entities, such as unions, directly participate in Michigan electoral politics because they are not prohibited at all from speaking through independent expenditures.[2] Labor unions often line up on the opposite sides of issues and candidates from the business community, and, thus, it is important for the State Chamber to be allowed to also directly speak through independent expenditures in electoral politics [J.A. 149a (LaBrant Testimony)].

In 1985, a special election was called to fill a vacancy in the Michigan House of Representatives. The State Chamber sought to make a public statement through a one-quarter page advertisement in the *Grand Rapids Press* to support Richard Bandstra, one of the candidates. [J.A. 60a (Plaintiffs' Exhibit 14)]. The State Chamber's statement in support of Richard Bandstra would have been an independent expenditure because it would not have been made at the direction of, controlled by, or coordinated with the candidate committee. [J.A. 154a-155a (LaBrant Testimony)]. Because of the criminal felony provisions of Section 54(3), however, the State Chamber did not publish its statement. [J.A. 155a (LaBrant Testimony)].

On May 24, 1985, the State Chamber filed a Complaint in the United States District Court for the Western District of Michigan (the "Trial Court") challenging the constitutionality of the prohibition against corporate independent expenditures as a violation of the State Chamber's and its members'

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[2] Labor unions may also make contributions and expenditures directly to or on behalf of a candidate.

free expression and equal protection rights under the Michigan and United States Constitution.[3] [J.A. 3a].

The Trial Court found that Act 388 did not infringe upon free expression or equal protection rights because it served the state interest in preventing real or apparent corruption. *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986) [Jurisdictional Statement Appendix 39a, 59a].[4]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the decision of the Trial Court and held that the prohibition against corporate independent expenditures violates the State Chamber's First Amendment rights. *Michigan State Chamber of Commerce v. Austin*, 865 F.2d 716 (6th Cir. 1988); [J.S.App. 1a]. The Sixth Circuit did not find it necessary to address the State Chamber's least restrictive means analysis or equal protection challenge to Act 388. [J.S.App. 28a-29a].

SUMMARY OF THE ARGUMENT

In this case a nonprofit corporation having profit corporation members is challenging a state statute absolutely prohibiting corporate independent expenditures. The only legitimate compelling state interest under the First Amendment for prohibiting political speech through independent expenditures is to prevent real or apparent corruption.

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[3] Article I, §§ 2, 3, and 5 of the Michigan Constitution are construed identically with the First and Fourteenth Amendments to the United States Constitution. *See e.g. Mutchall v. City of Kalamazoo*, 323 Mich. 215, 227; 35 N.W.2d 245 (1948); *People v. Walker*, 135 Mich. App. 267, 276; 354 N.W.2d 312 (1984).

[4] References to the Jurisdictional Statement Appendix shall be made as [J.S.App.].

This Court has consistently held that independent expenditures by their very nature do not cause real or apparent corruption. The state has never presented any evidence regarding corporate independent expenditures which would alter this analysis. The state's own expert testified that there is no evidence of corruption arising from corporate independent expenditures. The absence of prearrangement and coordination will undermine the value of the independent expenditure to the candidate thereby alleviating any danger of corruption whether it is made by a corporation, a wealthy political action committee ("PAC"), or a wealthy individual.

Even if the state had presented some evidence of corruption, Michigan's statute violates the First Amendment because it is both overinclusive and underinclusive. All corporations, regardless of their size, wealth, or influence, are flatly prohibited from making independent expenditures; but unincorporated entities, such as unions and partnerships, are not restricted at all. These unincorporated entities share many of the same benefits as corporations and have a similar ability to amass wealth in the economic marketplace. But unlike corporations, unions and other unincorporated entities are allowed to use their "large aggregations of wealth" in the political marketplace. The state has not, and cannot, explain why the independent expenditures of these entities differ from corporate independent expenditures in their impact on the electoral process.

Shareholder protection, the only other justification presented by the state, also cannot justify the prohibition against corporate independent expenditures. Elected officials enact legislative and administrative regulations which directly impact the business of a corporation. When a member joins the State Chamber (or a shareholder invests in a corporation), they delegate to the Board of the Directors the authority to make business decisions on behalf of the corporation. These business decisions necessarily involve legisla-

tive actions and administrative regulations—and the elected officials who make them. If a member of the State Chamber or a shareholder in a corporation disagrees with a decision made by the Board of Directors or its officers, they may elect new directors, seek to amend the bylaws, bring a derivative action, or even withdraw their membership or investment from the corporation. Thus, shareholder protection cannot justify the total prohibition against corporate independent expenditures.

In addition, the Michigan statute is both overinclusive and underinclusive if shareholder protection is the justification for the absolute prohibition against corporate independent expenditures. Again, unions, partnerships, and other unincorporated entities are not prohibited at all from making independent expenditures. The individuals investing and/or participating in these entities share many of the same attributes as corporate shareholders. The fact that the state makes no attempt to protect their investments undermines its concern for shareholder protection. The state also makes no exception where all the shareholders consent to a corporate independent expenditure. Thus, because the statute is both underinclusive and overinclusive, shareholder protection does not justify Michigan's prohibition against corporate independent expenditures under the First Amendment.

The statute also violates the Equal Protection Clause of the Fourteenth Amendment because it does not restrict unions and other unincorporated entities. The state cannot treat these entities differently from corporations unless it can show that their independent expenditures are less likely to cause harm. Again, the state has not, and cannot, show that corporate independent expenditures create any more corruption or have any different impact upon the electoral process than the independent expenditures of a union or a large partnership. Unlike the federal statute, which treats unions and corporations the same, Michigan's disparate treatment of

corporations and unions violates the Equal Protection Clause.

Finally, Michigan's statute violates the Equal Protection Clause because it allows media corporations to make independent expenditures. The First Amendment does not accord any special protection to media corporations. There is, therefore, no reason why a media corporation should be treated any differently than a nonmedia corporation.

The First Amendment protects the public's right to be fully informed. By silencing some corporations, but allowing other economic entities to speak freely, the state is clearly violating the First Amendment: The state cannot dictate *who* will speak and *what* they will say. The prohibition against corporate independent expenditures in Michigan, therefore, is unconstitutional under the First and Fourteenth Amendments.

ARGUMENTS

I. ACT 388'S ABSOLUTE PROHIBITION AGAINST CORPORATE INDEPENDENT EXPENDITURES FOR ADVOCACY VIOLATES THE FIRST AMENDMENT.

The First Amendment issue in this case has never been squarely presented to this Court. For the very first time, a nonprofit ideological corporation having profit corporation members is challenging a prohibition against pure speech through corporate independent expenditures for political advocacy. If the Sixth Circuit is reversed, it will be the *first* and *only* time this Court will have suppressed pure speech through independent expenditures. The Court, therefore, must affirm the Sixth Circuit's decision and thereby affirm the long standing commitment to protect pure First Amendment speech.

Independent expenditures for advocacy in political elections represent pure speech within the traditional core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Independent expenditures are part of the most highly protected speech because they represent speech that is "intimately related to the process of governing . . ." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("*NCPAC*"); *Buckley, supra*, 424 U.S. at 19-21. Independent expenditures for advocacy in support of or in opposition to a candidate for political office are entitled to no less protection "under the First Amendment than the discussion of political policy generally or the advocacy of the passage or defeat of legislation." *Buckley, supra*, 424 U.S. at 48.

The fact that a corporation is making the independent expenditure also does not lessen the protection afforded under the First Amendment:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. [Footnotes omitted] [*Bellotti, supra*, 435 U.S. at 777]

Thus, corporate independent expenditures, *in contrast to contributions*, are accorded the greatest degree of First Amendment protection under the most demanding standard of judicial review.

The most demanding standard of judicial review is strict or exacting scrutiny. *See Bellotti, supra*, 435 U.S. at 786. Under this standard, the state must prove that its prohibition against corporate independent expenditures is a narrowly tailored means of serving a compelling state interest. *See Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535 (1980).

The state argues that Act 388 serves the compelling state interests in: (1) preventing large aggregations of corporate wealth from corrupting the political process, either directly or through conduit organizations, and (2) protecting corporate shareholders. The Sixth Circuit correctly held that the State Chamber's independent expenditures do not present these dangers and that Act 388 does not serve the state's purported interests in preventing corruption or protecting shareholders.

A. Act 388's Absolute Prohibition Against Corporate Independent Expenditures Does Not Serve The Compelling State Interest In Preventing Real Or Apparent Corruption.

Preventing real or apparent corruption in the electoral process is the *only* legitimate compelling state interest for restricting independent expenditures. *NCPAC, supra*, 470 U.S. at 496-497.

Because of the lack of evidence, the Trial Court did not find that the State Chamber's independent expenditures would corrupt the electoral process. Instead, the Trial Court held that corporate independent expenditures "*may* . . . create an atmosphere of distrust or the appearance of corruption." (Emphasis added) [J.S.App. 64a]. The Trial Court cited *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982) ("*NRWC*"), for the proposition that "Courts should

not 'second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.' " [J.S.App. 65a].

The Sixth Circuit correctly rejected this reliance upon a broad prophylactic rule because *this case* involves "independent expenditures"—not "contributions".

In *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 259-260 (1986), this Court distinguished *NRWC*, a contributions case, and also soundly rejected any reliance upon broad prophylactic rules where independent expenditures are involved:

> *National Right to Work Committee* . . . upheld the application to a non-profit corporation of a different provision of §441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates . . . . We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending . . . .
>
> In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that non-member corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than §441b provides. [Citations omitted]

See also NCPAC, 470 U.S. at 495-496.

The standard of review required for independent expenditures is "rigorous." *NCPAC, supra*, 470 U.S. at 501. At issue is not the fine-tuning of prophylactic limitations, but the wholesale restriction of clearly protected speech. *Id.* The desirability of a broad prophylactic rule, therefore, without some *proof* of corruption, cannot justify Act 388's wholesale prohibition of First Amendment speech through independent expenditures for advocacy.

Each and every time that this Court has considered a prohibition against independent expenditures, it has concluded that there is *no proof* of corruption. *Buckley, supra, NCPAC, supra*, and *MCFL, supra*. In *Buckley, supra*, a case involving individual independent expenditures, this Court found:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. *[Buckley, supra, 424 U.S. at 47]*

In *NCPAC, supra*, involving PAC independent expenditures, the Court also found:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns . . . . But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate . . . . The Court con-

cluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign . . . .

We think the same conclusion must follow here. It is contended that, because the PACs by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view . . . . [H]ere, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more. *[NCPAC, supra*, 470 U.S. at 497-498]

The State Chamber's independent expenditures would not differ from an individual's or a PAC's independent expenditures so as to affect the conclusion reached in *Buckley* and *NCPAC* that independent expenditures, by their very nature, do not cause real or apparent corruption. The state baldly asserts, however, that the State Chamber's independent expenditures would cause real or apparent corruption—but the state has never produced any evidence that an exchange of political favors for uncoordinated expenditures is anything more than a hypothetical possibility.

Virtually all of the state's evidence at trial dealt with a study of PAC activity in Michigan. A corporation can, however, specifically direct a PAC's contributions and independent expenditures. It is difficult to understand, therefore, how a PAC will eliminate or reduce the alleged corruption claimed by the state. Whether made from a PAC or the corporate treasury, the independent expenditure will be identified by the public and by candidates with the particular corporation. [J.A. 104a, 109a (Mayberry Testimony)]. Thus, all of the state's evidence relating to PACs is not only wholly irrelevant to the issue of whether direct corporate independent expenditures cause real or apparent corruption, but also seriously undermines the state's position on this issue.

The record in this case clearly establishes that independent expenditures guard against real and apparent corruption. The state's own expert witness testified that there was *no evidence* of corruption arising from corporate independent expenditures. [J.A. 86a (Epstein Testimony)]. (Mr. Epstein lives and teaches in California, a state which does not prohibit corporate independent expenditures.) Independent expenditures, by their nature, are visible, contribute to public debate, and are subject to rebuttal. [J.A. 111a, 116a-119a (Mayberry Testimony)]. The source of all independent expenditures, including corporate independent expenditures, must be clearly identified. Mich. Comp. Laws Ann. §169.247 (West Supp. 1989). This identification allows the electorate to judge the relative viewpoints expressed. [(J.A. 97a (Mayberry Testimony)]. The high visibility of independent expenditures, including corporate independent expenditures, therefore, deters improper commitments by candidates.

Corporate independent expenditures, like all other independent expenditures, do not necessarily aid a candidate's campaign and, indeed, may actually harm it. The absence of

prearrangement and coordination with a candidate or his agent undermines the value of the expenditure to the candidate and alleviates the danger of a *quid pro quo* for improper commitments from the candidate [J.A. 117a (Mayberry Testimony)]; *Buckley, supra*, 424 U.S. at 47.

The state nonetheless argues that because the State Chamber has profit corporation members, the state may prohibit pure First Amendment speech because it will be made with money amassed from corporate treasuries. The state contends that corporate wealth poses a special danger because such wealth has a "deleterious influence" upon elections.[5] Aside from the undisputable fact that not all corporations have large masses of wealth, the state does not explain how an independent expenditure made by Donald Trump will have any less, or any different, impact upon the electoral process than an independent expenditure by W.S. Smith Company, a closely-held Michigan corporation.[6] In either case, the absence of prearrangement and coordination will undermine the value of the independent expenditure thereby alleviating any danger of corruption. *Buckley, supra*, 424 U.S. at 47.

Moreover, it is contrary to all principles of our society and our government to suppress pure First Amendment speech because the speaker has more or less wealth than other speakers:

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[5] The state cites *NRWC, supra*, and *United States v. UAW*, 352 U.S. 567 (1957). The Court did not address any constitutional issues in *UAW*, and *NRWC* was a contributions—not an independent expenditures—case. Contribution limitations are not subject to as rigorous review. *MCFL, supra*, 479 U.S. at 238-239. Thus, the justifications in *NRWC* do not apply to this case.

[6] Woodward Sidney Smith, who testified at trial, owns the W.S. Smith Company. [J.A. 91a-94a (Smith Testimony)].

> Especially where, as here, the Legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted] *[Bellotti, supra*, 453 U.S. at 785-786].

As Justice Douglas noted in his dissenting opinion in *United States v. UAW*, 352 U.S. 567, 593 (1957):

> Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during the election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

The people of this nation are entrusted with the responsibility of judging and evaluating the relative merits of conflicting arguments. It is not the state's responsibility to "protect" the people by prohibiting certain speech:

> [The people] may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. [Footnote omitted] *[Bellotti, supra*, 453 U.S. at 791-792]

The prohibition against corporate independent expenditures under Act 388, without any proof of real or apparent corruption, clearly violates the freedoms secured by the First Amendment, and this Court, therefore, must affirm the decision of the Sixth Circuit.

B. *MCFL* Does Not Compel This Court To Uphold Act 388.

The state's and the amicus parties' arguments rise and fall upon their contention that, because the State Chamber does not satisfy the "three part test" established in *MCFL, supra*, Act 388 is constitutional. In particular, they contend that the State Chamber may be used as an improper conduit by its profit corporation members to make otherwise prohibited independent expenditures.

The fallacy of this position is twofold. First, this Court did not establish a "three-part test" of constitutionality in *MCFL*. Instead, the Court considered three "features" of MCFL which led it to conclude that a prohibition against MCFL's independent expenditures did not serve any compelling state interests. Second, this Court did not hold that independent expenditures by profit corporations may be constitutionally prohibited:

> Our conclusion is that §441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that *organizations* that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.
>
> *Regardless of whether that concern is adequate to support the application of §441b to commercial enterprises, a question not before us, that justification does not extend uniformly to all corporations.* [Emphasis added] [*MCFL, supra*, 479 U.S. at 263]

In *MCFL, supra*, 479 U.S. at 262, the FEC argued that it was necessary to prohibit corporate independent expenditures in order to prevent nonprofit corporations from being

used as conduits for massive undisclosed spending by profit corporations and unions. This argument was rejected by the plurality in *MCFL, supra*, as well as by Justice 0'Connor in her concurring opinion. *MCFL, supra*, 479 U.S. at 265 (0'Connor, J., concurring). Thus, a majority of the Court agreed that the state's interest in disclosure could be met in a less restrictive manner than absolutely prohibiting direct independent expenditures or by forcing corporations to speak only in a limited fashion through a PAC.

The Sixth Circuit noted that Section 51 of Act 388 provides a reporting mechanism that will prevent the State Chamber from being used as an improper conduit for undisclosed spending. Mich. Comp. Laws Ann. §169.251 (West Supp. 1989); [J.S.App. 25a-26a]. The state argues that Section 51 does not apply to corporations. The state apparently concludes that since Section 51 does not apply, the *only* alternative available is to wholly *prohibit* all independent expenditures by the State Chamber. The fact that the Legislature may not have yet enacted a reporting requirement which applies to the State Chamber cannot justify the state's denial of fundamental First Amendment rights.

The state and amicus also argue, however, that the "*MCFL* limitations" extend not only to undisclosed corporate contributions, but also to corporate independent expenditures. (Appellants' Brief, p. 44) This reference by the state to *MCFL* dealt with the Court's review of past contribution cases such as *NRWC. This case* involves *independent expenditures*—not *contributions*. While disclosure arguably may not be a sufficient safeguard where contributions are involved, a prohibition against independent expenditures requires more rigorous review and must be narrowly tailored to serve the compelling interest in preventing real or apparent corruption.

As discussed above, there is absolutely no evidence—indeed there is contradicting evidence—that real or apparent corruption arises from corporate independent expenditures, whether made by profit or nonprofit corporations. Moreover, other factors will prevent profit corporations from using the State Chamber as a conduit to make massive independent expenditures. If the State Chamber's independent expenditures become excessive, it may be classified as a political organization under I.R.C. § 527(e)(1) and be subjected to all the taxes and regulations applicable to such groups. In addition, I.R.C. § 162(e)(2) and I.R.C. § 527(f) will limit the State Chamber's independent expenditures. Membership dues for nonprofit business leagues are tax deductible to the extent that they are not used for political purposes under I.R.C. § 162(e)(2), and all independent expenditures of any tax exempt entity are subject to taxation under I.R.C. § 527(f). These factors also will deter the State Chamber from making massive independent expenditures in the political marketplace.[7]

Even if the state could show some evidence of corruption, there are certainly less restrictive means to protect the political process than silencing the political speech of nonprofit corporations such as the State Chamber. For instance, the size of corporate independent expenditures may be limited, or through detailed record keeping and reporting requirements, the state could monitor and control the State Chamber's independent spending as well as its receipt and disbursement of corporate membership dues used for political purposes.

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[7] Thirty states currently permit corporate independent expenditures apparently with no corruption of the political process. (Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington.)

Amicus Common Cause argues that less restrictive means will not work because money from membership dues is "fungible". In short, Common Cause is arguing that it would be administratively difficult to regulate the State Chamber's independent expenditures through disclosure. Administrative convenience, however, cannot justify an infringement upon fundamental First Amendment speech. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 102, n.9 (1972).

C. Act 388 Is A Fatally Overbroad And Underbroad Response To The Alleged Threat Of Corruption.

Assuming, for sake of argument, that the state did show some proof of real or apparent corruption, the prohibition against corporate independent expenditures, whether made by a profit or nonprofit corporation, must be overturned under the First Amendment narrow tailoring requirement because Act 388 is a fatally overinclusive and underinclusive response to this alleged evil.[8]

Act 388 is both overbroad and underbroad because it simultaneously prohibits *all* corporations, regardless of their purpose, size, or wealth, from directly speaking on candidates' qualifications while at the same time placing *no* limitations whatsoever on the same speech of other economic entities.

All profit and nonprofit corporations, including charitable corporations, incorporated trade associations, professional

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[8] If the Court affirms the Sixth Circuit on the basis of the narrow tailoring or equal protection analysis, its decision will *not* render the federal statute or any similar state statutes unconstitutional. (Only 11 states have laws treating corporations and labor unions differently. See n. 13, p. 31, *infra*.)

corporations, large multinational corporations, and small closely-held corporations are indiscriminantly prohibited from advocating through independent expenditures—regardless of size, wealth, or influence.

Act 388 does not similarly limit direct advocacy on candidates' qualifications by individuals, unions, business partnerships, limited partnerships, or other unincorporated entities. A closely-held corporation employing 10 workers cannot comment on the qualifications of candidates but a union representing the interests of tens of thousands of auto workers or a partnership employing over 600 workers can speak freely through independent expenditures. The union and the partnership exercise control over large aggregations of capital accumulated in the economic marketplace, but only the corporate entity with much less capital and influence is prohibited from speaking.

In addition, many of these unincorporated entities share the benefits enjoyed by corporations. The state has limited the liability of limited partners in the same manner as corporate shareholders. Mich. Comp. Laws Ann. § 449.1303(a) (West 1989). Limited partners, like corporate shareholders, also have the right to bring derivative actions. Mich. Comp. Laws Ann. § 449.2001 (West 1989). In addition, unions members have limited liability, and a union has the ability to sue and be sued and to hold assets as an independent legal entity. *See generally* Segall, *The Wrong Pocket: Union Liability for Health and Safety Hazards*, 4 Indus. Rel. L.J. 390, 392-393 n.18 (1981) (unions can sue and be sued, hold assets as independent legal entities, and limit the personal liability of their members); 48 Am. Jur. 2d *Labor and Labor Relations* §47 (1979) (modern labor unions approximate corporations in their methods of operation and power). These benefits allow these entities to amass wealth in the economic marketplace for union or business purposes—wealth which the

state allows them to freely use in Michigan's political marketplace. Only corporations, however, are singled out and silenced.

It is impossible for the state to explain how the independent expenditures of a union, a partnership or an unincorporated entity made for business purposes suddenly causes a "deleterious effect" upon the political process if the entity decides to incorporate. There obviously is no factual basis for finding that the potential for corruption or the appearance of corruption arising from independent expenditures differs between a union, a partnership, a wealthy individual, or a corporation.

Thus, not only is Act 388 overbroad in including all corporations, but it is underinclusive as well because it does not include other wealthy, influential economic entities in our society. While a cautious step by step approach may be appropriate where contributions are involved, *NRWC, supra*, 459 U.S. at 209, the First Amendment requires restrictions upon independent expenditures to be *narrowly* tailored under rigorous scrutiny. *NCPAC, supra*, 470 U.S. at 501. The inclusion of all corporations, regardless of their size, wealth, or purpose, and the exclusion of other economic entities, such as unions and partnerships, renders Act 388's prohibition against corporate independent expenditures unconstitutional under the First Amendment.

D. Act 388's Absolute Prohibition Against Corporate Independent Expenditures Does Not Serve The State's Purported Interest In Protecting Shareholders.

The state argues that Act 388 is justified by its interest in protecting shareholders from having their money used to support political candidates to whom they may be opposed. The state again relies solely upon contribution cases such as

NRWC, supra, 459 U.S. at 208. In an independent expenditure case subject to more exacting scrutiny, however, shareholder protection is not a sufficiently compelling state interest.

In *MCFL, supra*, the Court found that shareholder protection was not a compelling state interest:

> Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. . . . Finally, a contributor dissatisfied with how funds are used can simply stop contributing. [*MCFL, supra*, 479 U.S. at 260-261]

This reasoning applies to the State Chamber as well because it is a voluntary membership corporation. Members pay their dues to the State Chamber because they regard the contribution as a more effective means of advocating the interests of business than individual spending. [See J.A. 93a (Smith Testimony)]. They delegate to the State Chamber the authority to use their membership dues in the most effective way to accomplish the objectives of the State Chamber. If a member becomes dissatisfied, it can exercise its rights as a member by electing different directors, seeking an amendment to the bylaws or withdrawing its membership.

This reasoning also applies to shareholders of profit corporations. By investing in corporations, the shareholders authorize the directors to use their investments to effectively accomplish the corporation's business objectives. Elected officials enact legislation and administrative regulations which directly and substantially impact the business community. Thus, the most effective way to serve a corporation's business objectives may include making independent expenditures to express the corporation's views on political candidates. As the state's expert witness recognized:

> [I]ndependent expenditures on the part of a corporation are directly instrumental to the business objectives of the corporation . . . . I mean, they have a very instrumental objective in mind; that is, facilitating the business objectives of the firm. [J.A. 77a (Epstein Testimony)]

Every shareholder investing in a profit corporation realizes that the corporation will undertake a number of specific actions with which the shareholder may disagree. These actions include investment and planning decisions, lobbying decisions, and political speech. *See generally* Prentice, *Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech*, 16 Tulsa L.J. 599, 638-640 (1981). As long as political speech, like investment and planning decisions, serves the corporation's business objectives, shareholder protection cannot justify the prohibition against corporate independent expenditures.

Moreover, few shareholders would be greatly inconvenienced if, because they disagreed with a corporation's business decision, they choose to withdraw their interest and reinvest their money elsewhere. Nonetheless, there are ample means for a member in the State Chamber or a shareholder in a profit corporation to challenge a corporation's business decisions short of withdrawing his or her member-

ship or investment.[9] As noted in *Bellotti, supra*. 435 U.S. at 794-795:

> Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

Thus, shareholder protection is not sufficiently compelling to justify the total prohibition against corporate independent expenditures.

Assuming *arguendo* that shareholder protection is a compelling state interest, Act 388 is unconstitutional because it is not narrowly tailored to serve that interest. Act 388 prohibits *all* corporations from making independent expenditures but does not prohibit labor unions, limited partnerships, trusts, or other entities from making independent expenditures.

In *Bellotti, supra*, 435 U.S. at 793-795, without considering whether the interest was indeed compelling, the Court found that where independent expenditures are involved the interest in shareholder protection did not survive strict scrutiny because the statute was not narrowly tailored to serve that interest.

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[9] The state and amicus argue that members cannot simply withdraw from the State Chamber because they would lose their group insurance. The insurance programs are not a significant part of the State Chamber's functions. In fact, if a business league mainly directs its activities to providing services and benefits to members, it is not tax-exempt under I.R.C. § 501(c)(6).

First, the statute in *Bellotti, supra*, 435 U.S. at 793, singled out banks and business corporations and excluded entities such as unions and trusts. The Court noted that the interests of participants in these entities with respect to institutional speech were comparable to those of minority shareholders in a corporation. The exclusion of these entities undermined the state's purported concern for shareholders and rendered the statute unconstitutional because it was underinclusive and not narrowly tailored to serve the interest in shareholder protection. *Bellotti, supra*, 435 U.S. at 793.

Second, the statute in *Bellotti, supra*, like Act 388 in this case, applied to all corporations, even if the shareholders unanimously authorized an "independent expenditure." Thus, the legislation was unconstitutionally overinclusive and not narrowly tailored to serve the interest in shareholder protection. *Bellotti, supra*, 435 U.S. at 794.

Act 388 singles out corporations and excludes such entities as unions and limited partnerships. Limited partners invest in limited partnerships in a manner very similar to shareholders. Indeed, in order to maintain their status as limited partners, limited partners cannot be actively involved in the management of the partnership. Mich. Comp. Laws Ann. §449.1303 (West 1989). The state is not concerned, however, in protecting the investment of a limited partner from being used for political purposes. The same concern is lacking for union members. In discussing past *contribution* cases, this Court noted in *MCFL, supra*, 479 U.S. at 260:

> But such persons, as noted contribute . . . union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend upon the organization . . . for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving . . . the union.

Act 388's exclusion of unions and limited partnerships undermines the state's purported concern for shareholders and renders the prohibition against corporate independent expenditures unconstitutional because of its underinclusiveness. *Bellotti, supra.*

Act 388 also applies to all corporations even if all the shareholders consent to the independent expenditures. Thus, Act 388, like the statute in *Bellotti,* is both underinclusive and overinclusive and is not narrowly tailored to serve the state's purported interest in shareholder protection.

E. The Availability Of PACs Does Not Compensate For Or Justify The Wholesale Prohibition Of Corporate Independent Expenditures.

The state argues that Act 388 does not violate the First Amendment because the State Chamber can participate in the political process through a PAC. This Court conclusively rejected this argument in *MCFL, supra,* 479 U.S. at 255, by finding that PACs are not a constitutionally adequate substitute for direct independent expenditures.

Simply because it was incorporated, MCFL, like the State Chamber, was required to establish a PAC if it wanted "to engage in any independent spending whatsoever." *MCFL, supra,* 479 U.S. at 253. The Court noted:

> [The] MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore,

> such duties require a far more complex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech . . . .
>
> Thus, while §441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. *The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize §441b as an infringement on First Amendment activities.* [Emphasis added] *[MCFL, supra,* 479 U.S. at 254-255]

An examination of the nature of PACs and the record in this case demonstrates that the PAC system does not render Act 388 constitutional under the First Amendment.

Section 55 of Act 388 allows corporations to establish and administer PACs. Mich. Comp. Laws Ann. §169.255 (West Supp. 1989). A corporation can direct the corporate PAC to make contributions and expenditures on behalf of candidate committees, ballot question committees, political party committees, and independent committees. The PAC can only use money solicited from shareholders,[10] directors and officers, or managerial employees to make these contributions and expenditures. It cannot use corporate treasury funds to make contributions and expenditures.

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[10] A membership corporation may solicit PAC contributions from individual members; or shareholders, officers, directors or policy making, managerial, professional, supervisory, or administrative employees of corporate members. Mich. Comp. Laws Ann. §169.255(3) (West Supp. 1989).

The PAC system interferes with a corporation's ability to speak effectively, or perhaps even to speak at all. Not all corporations can form PACs. In fact, those corporations which are least able to form PACs are also least able, under the state's reasoning, to cause real or apparent corruption because they have less capital and influence.

The efficacy of corporate PACs is limited by several factors. PACs are expensive. It costs between 25% and 50% of the amount spent by a PAC to establish and maintain a PAC. [J.A. 103a, 108a (Mayberry Testimony)]. Small and medium size corporations do not have the resources needed to pay this expense. [J.A. 92a (Smith Testimony), 109a (Mayberry Testimony)]. Thus, the small and medium size corporations that constitute the majority of the State Chamber members, and that do not have the capital or influence discussed by the state, also do not have the ability to speak on candidate qualifications through their own PACs.

In addition, because PACs cannot use corporate treasury funds and because they can solicit contributions only from a limited group of people, the ability of any corporation to speak through a PAC is dependent upon its ability to be a good fund raiser. [J A. 129a-130a (Barrett Testimony), 150a (LaBrant Testimony)]. Smaller corporations with fewer stockholders, directors and officers, and managerial employees may not be able to raise a sufficient amount of money for a PAC. These smaller corporations, therefore, are effectively prohibited from speaking in the electoral process.

While a shareholder of a small corporation may join with shareholders of other corporations to contribute to a PAC, such as the State Chamber's PAC, this is not an effective replacement for direct speech by the small corporation itself. For example, Mr. Smith, the sole shareholder of the W.S. Smith Company, who testified at trial, contributes to the State Chamber PAC so that the voice of business may be

represented in state electoral politics. The State Chamber PAC, however, does not advocate the interests of the W.S. Smith Company in local elections which have a direct impact on the W.S. Smith Company. [J.A. 93a-94a (Smith Testimony)].

PACs also have a poor public image: the public views PACs with suspicion [J.A 92a (Smith Testimony), 104a, 108a (Mayberry Testimony), 133a (Barrett Testimony), 153a (LaBrant Testimony)]; and PACs are cumbersome because of the complex regulatory requirements and expenses related to their establishment and administration. [J.A. 104a (Mayberry Testimony)]. These factors deter some corporations from forming PACs to speak on electoral politics [J.A. 92a (Smith Testimony)].

Thus, the PAC system cannot compensate for or justify the prohibition against direct corporate advocacy through independent expenditures. Instead, the PAC system further accentuates the overbreadth of Act 388 by preventing less wealthy and influential corporations—even small or marginal corporations—from participating in the electoral process either directly *or* indirectly.

In arguing that Act 388 is constitutional, the state notes at length the success of the State Chamber PAC.[11] The Court noted in *MCFL*, however:

> While the burden on the MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we

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(11) This action was brought on behalf of the State Chamber and its members. The State Chamber also can challenge Act 388 because it threatens the First Amendment rights of others. *See Board of Airport Commissioners of Los Angeles v. Jews For Jesus, Inc.*, 482 U.S. 569 (1987). Thus, the success of the State Chamber PAC does not make Act 388 constitutional.

> do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution. [*MCFL*, *supra*, 479 U.S. at 263]

In *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988), the Court also rejected this argument:

> Appellants argue that even if the statute imposes some limitations on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees . . .
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression . . . The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing. [Citations omitted]

Thus, because the State Chamber may have made the best of an infringement on constitutionally protected speech does not, and cannot, render the infringement constitutional.

Moreover, the availability of the PAC system for corporations is subject to the whim of the Michigan Legislature. Just recently, President Bush proposed to abolish corporate and union PACs at the federal level. If the Michigan Legislature decided tomorrow to strike Section 55 from Act 388, the State Chamber and all other corporations will have absolutely no chance to express their views to the general public—while at the same time unions will remain free to

speak in the most direct and most economical fashion through independent expenditures.

The fact remains that, even with the present allowance of corporate PACs, Act 388's prohibition against corporate independent expenditures for advocacy restricts the amount, content, and method of constitutionally protected speech without any constitutionally adequate justification.

II. ACT 388'S DISPARATE TREATMENT OF NONMEDIA CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE.

Act 388's disparate treatment of nonmedia corporations with respect to unions, media corporations and other unincorporated entities violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, if this Court should reverse the Sixth Circuit under the First Amendment issue, it should nonetheless hold Act 388's prohibition against corporate independent expenditures unconstitutional under the Fourteenth Amendment.[12] Such a ruling will not affect the federal statute or a majority of the state statutes because only 11 states do not prohibit union political speech while prohibiting the political speech of corporations.[13]

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[12] This Court may consider the Equal Protection challenge because it is supported by the law and the record and it will not expand the relief granted by the Sixth Circuit. S. Ct. R. 10.5. [See Complaint, J.A. 9a-11a]

[13] Iowa Code Ann. §56.29 (West Supp. 1989) (Iowa); Ky. Rev. Stat. §121.025 (Michie Supp. 1988) (Kentucky); Mass. Gen. Laws Ann. ch. 55, §8 (West Supp. 1989) (Massachusetts); Mich. Comp. Laws Ann. §169.254 (West Supp. 1989) (Michigan); Minn. Stat. Ann. 211B.15 (Supp. 1989) (Minnesota); Mont. Code Ann. §13-35-227 (1987) (Montana); Ohio Rev. Code Ann. §3599.03 (Page 1988) (Ohio); Okla. Stat. Ann tit. 74, §4219 (West Supp. 1989) (Oklahoma); Tenn. Code Ann. §2-19-132 (1985) (Tennessee); W. Va. Code §§ 3-8-8 to 3-8-13 (1987) (West Virginia); Wis. Stat. Ann. §11.38 (West 1986 & Supp. 1988) (Wisconsin).

A. Act 388 Improperly Discriminates Between Nonmedia Corporations And Labor Unions And Other Unincorporated Entities.

Corporations are entitled to the equal protection of the laws under the Fourteenth Amendment. *See e.g. Gulf, Colorado & Santa Fe Railway Co. v. Ellis,* 165 U.S. 150, 154 (1897). Act 388's prohibition against corporate independent expenditures is subject to strict scrutiny under the Fourteenth Amendment because it burdens the exercise of the fundamental First Amendment right of freedom of speech. [J.S. App. 70a-71a]. *See Carey v. Brown,* 447 U.S. 455 (1980); *Bellotti, supra,* 435 U.S. at 785-786; *Buckley, supra,* 424 U.S. at 14; *Police Department of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). Strict scrutiny requires distinctions drawn by the government to be precisely tailored to serve a compelling state interest. *See e.g. Plyler v. Doe,* 457 U.S. 202, 216-217 (1982); *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972).

The compelling interest analysis under the First Amendment is not applicable to the strict scrutiny analysis under the Equal Protection Clause. Even if a restriction on speech is justified by a compelling state interest, the restriction cannot burden some groups more than others without a demonstration that such disparate treatment serves a compelling interest and that the restriction has been narrowly tailored to reduce, to the greatest degree possible, the incidence of the disparate treatment.

In *Mosley, supra,* this Court held that a Chicago ordinance prohibiting picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, violated the Equal Protection Clause of the Fourteenth Amendment:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, *under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. Tinker v. Des Moines School District,* 393 U.S. 503, 511 (1969); *Wirta v. Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P. 2d 982 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful [*Mosley, supra,* 408 U.S. at 100]
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> * * *
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> *The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. Williams v. Rhodes,* 393 U.S. 23 (1968); see generally *Dunn v. Blumstein,* 405 U.S., at 342-343. Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. *Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing.* Such excesses 'can be controlled by narrowly drawn statutes,' *Saia v. New York,* 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter. [Emphasis added] [Footnote omitted] [*Id.* 408 U.S. at 101-102]

Michigan allows unions, partnerships and other unincorporated entities to make independent expenditures. Therefore, the state cannot prohibit corporate independent expenditures unless it can demonstrate that independent expenditures by any type of corporation are *clearly* more harmful than the independent expenditures of unions, partnerships, and other unincorporated entities. Specifically, be-

cause preventing real or apparent corruption is the only legitimate compelling state interest for restricting independent expenditures, the state must demonstrate that corporate independent expenditures clearly lead to *more* real or apparent corruption than the independent expenditures of unions, partnerships and other unincorporated entities. *NCPAC, supra,* 470 U.S. at 496-497.[14]

The state cites *MCFL, supra,* 479 U.S. at 258-259 n.11, in claiming that Act 388 does not violate the Equal Protection Clause. In that footnote in *MCFL,* the Court cited *NRWC.* Neither *MCFL* nor *NRWC* involved an equal protection challenge to the legislation in question. Moreover, *NRWC* and *MCFL* do not support the conclusion that corporations differ from other economic entities such as unions with respect to their role in the electoral process. Indeed, these decisions are part of a large body of federal statutory and decisional precedent supporting analogous treatment of both corporations and labor unions with regard to campaign finance law.

Federal campaign finance laws have subjected labor unions to basically the same restrictions as corporations since the 1940's. *See United States v. CIO,* 335 U.S. 106, 114-116 (1948). *See also* 2 U.S.C.S. §441a-c (1980). This Court's recognition of the close similarities between unions and corporations goes back at least as far as *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 385 (1922), in which Chief Justice Taft stated that "in every way the union acts as a business entity, distinct from its members. No orga-

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[14] Shareholder protection, the only other justification offered by the state, is not sufficiently compelling where independent expenditures are involved. See Section I(D) *supra.* Act 388's failure to protect union members, limited partners, and others violates the Equal Protection Clause. The state cannot prove that these individuals are subject to any less harm than corporate shareholders if the organization in which they have invested money makes an independent expenditure.

nized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."

The assumption that corporate independent expenditures are associated with more real or apparent corruption than the independent expenditures of noncorporate entities is also not supported by common sense. "Big labor" is as powerful [J.A. 100a (Mayberry Testimony)] and, therefore, just as capable of corruption as big corporations (and certainly more so than small corporations). In fact, with developments such as union representation on corporate boards, it is fair to state that big labor probably has more in common today with large corporations than large corporations have in common with small corporations.

Whether or not disparate treatment between corporations and unincorporated entities could have withstood strict scrutiny 73 years ago when Michigan's 1913 Corrupt Practices Act was enacted is irrelevant to determining whether this disparate treatment withstands strict scrutiny today. This is especially true because unincorporated entities, particularly unions, have increased their power and influence tremendously during this century. Indeed, the increased power of labor unions is a major reason why federal election law was amended to treat corporations and labor unions similarly. *See United States v. UAW,* 352 U.S. 567, 578-583 (1957). Distinctions which may have existed between corporations and unions in the past simply do not exist in the 1980's—and have not existed for many decades.

The state has never presented any evidence showing that corporate independent expenditures lead to either corruption or the appearance of corruption. Consequently, the state has never shown that corporate independent expenditures are more harmful than those of unions, partnerships or other unincorporated entities Further, as discussed extensively *supra,* even if the state had presented some evidence of corpo-

rate corruption, it has never, nor can it ever, present evidence that independent expenditures by unions, partnerships, or other unincorporated entities cause any less real or apparent corruption.

The state cannot explain why incorporated entities, including incorporated labor unions, are denied an opportunity to express their political views through independent expenditures while unincorporated entities, including unincorporated labor unions, are not. *Mosley, supra.* The existence of some incorporated Michigan labor unions highlights the weakness of the state's position because independent expenditures by the United Auto Workers ("UAW") will not suddenly create real or apparent corruption if the UAW decides to incorporate. The same is true of the independent expenditures of a partnership or a sole proprietorship which decides to incorporate.

The reason that Act 388's disparate treatment of corporations is subject to strict scrutiny must not be forgotten; Act 388 threatens the fundamental right of free speech. In *Bellotti, supra,* 435 U.S. at 784-786, the Supreme Court discussed the dangers created by restricting speech:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) . . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted]

The potential impact of skewed independent expenditure prohibitions on civil and political rights is not difficult to comprehend. Granting labor unions an advantage in communicating with the voting public while silencing corporations may well change political decisions made at the ballot box. Candidates are chosen because of their positions on issues discussed during the campaigns. Unions and corporations often line up on opposite sides of issues, such as workers compensation laws, wage and hour laws, etc. Thus, if unions are allowed to speak but corporations are not, decisions made by citizens who are not fully informed on all issues surrounding political candidates can alter the very structure of our government and affect virtually all civil and political rights. Act 388's disparate treatment of corporations, unions, and other unincorporated entities, therefore, must be held unconstitutional under the Equal Protection Clause.

B. Act 388 Improperly Discriminates Between Media and Nonmedia Corporations.

Section 6(3)(d) of Act 388 provides the following *exclusion* from the definition of expenditure:

> An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting. [Mich. Comp. Laws Ann. §169.206(3)(d)(West Supp. 1989)]

This exclusion violates the Equal Protection Clause by impermissibly denying certain corporations (nonmedia corporations) the right to make independent expenditures while allowing other corporations (media corporations) the same right. The Trial Court, however, improperly concluded that no distinction was created between "media" and "nonmedia" corporations:

> Section 6(3)(d) makes no distinction between media and

non-media corporations. Any corporation, whether termed a 'media' corporation or a 'non-media' corporation, may avail itself of the exemption from section 54(1) provided by section 6(3)(d). *Cf. United States* v *CIO*, 335 U.S. 106 (1948). Therefore, plaintiff's second claim under the equal protection clause must fail. [Footnote omitted] [J.S.App. 73a]

Section 6(3)(b) of Act 388 already allows expenditures for internal communications. Mich. Comp. Laws Ann. §169.206(3)(b) (West Supp. 1989); [J.S.App. 92a]. Reading Section 6(3)(d) as permitting internal communications through media instruments, therefore, renders it redundant and meaningless. Further, it is clear that the office of the Michigan Secretary of State, which implements and enforces Act 388, allows media corporations such as the corporation owning the *Grand Rapids Press* to communicate with the general public [*See* J.A. 57a], but does not allow nonmedia corporations such as the State Chamber to do so.

Thus, Act 388 discriminates between media corporations (i.e., corporations which own media institutions) and nonmedia corporations. Media corporations may make independent expenditures to communicate with the general public while nonmedia corporations are only allowed to use independent expenditures to communicate with their members.

Under the strict scrutiny test the disparate treatment of nonmedia corporations and media corporations must be precisely tailored to serve a compelling state interest—specifically, to prevent corruption or the appearance of corruption. It is clearly untenable to argue that media corporations are less prone to corruption than other corporations. The views of politicians on certain issues such as taxes, rape shield laws and libel/slander laws affect the media. Media endorsements, therefore, may very likely be influenced by business factors. Compare the Grand Rapids Press' editorial [J.A. 57a] with the State Chamber's proposed endorsement of the same candidate [J.A. 60a]. Why should one endorsement made for business purposes be lawful and the other, also made for business purposes, be a felony?

The only apparent legislative justification for allowing one group of corporations (media corporations) the right to make independent expenditures to communicate with the general public while denying another group of corporations (nonmedia corporations) the same right is that a special First Amendment status applies to media corporations. This distinction, however, is simply not supported by constitutional law.

This Court has repeatedly rejected the notion that the institutional media is entitled to greater rights under the First Amendment than other institutions or individuals. *Bellotti, supra*, 435 U.S. at 782 (the organized press has a monopoly on neither the First Amendment nor the ability to enlighten); *Pell v Procunier*, 417 U.S. 817, 833-834 (1974) (the press has no independent First Amendment right of access to prisons); *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) (the informative function served by the organizational press is also served by others). Clearly the constitution does not accord *special* treatment to media corporations under the First Amendment.

To the extent that Act 388's media exception reflects the desire of the Michigan Legislature to continue to allow political endorsements by media corporations, this exception constitutes an example of the most dangerous form of restriction on the voters' right to know. In *Bellotti, supra*, 435 U.S. 782, n.18, the Court noted:

> If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same

communication by appellants, the result would not be responsive to the informational purpose of the First Amendment. Certainly, there are voters in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new businesses into the state and to prevent established businesses from leaving, who would be interested in hearing appellants views on graduated tax as the views of media corporations that might be less knowledgeable on the subject.

The same reasoning applies to candidate elections. Candidates are not elected in a vacuum The debates on the qualifications of candidates for political office necessarily involve debates on the issues they support and oppose. Nonmedia corporations may be in a better position to express their views on the candidates and the issues supported and opposed by the candidates than the media. Indeed, nonmedia corporations may be able to force candidates to address issues of concern to the business community and, thus, the citizens of the state, that the media would want to avoid because of its own potentially conflicting business interests. Democratic government clearly is in peril when those in power are allowed to choose who will be allowed to exercise political speech and the form that such speech will be allowed to take.

The state has failed to either articulate or offer any proof or any proper rationale for the media exception. The unjustified disparate treatment between media and nonmedia corporations is another example of Act 388's failure to meet the narrow tailoring requirement of the strict scrutiny test, and is further evidence of why this Court should declare Act 388's prohibition against corporate independent expenditures unconstitutional under the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, Act 388's prohibition against corporate independent expenditures violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Appellee Michigan State Chamber of Commerce therefore requests this Honorable Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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